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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

DEANNE PENROD, MAXINE G.)
KITCHEN, DON SEVEY, JACK)
E. LaFOLLETTE, TRUMAN O.)
MOORE, and LINDA R. MOORE,)
Appellants,)
-vs-)
NU CREATION CREME, INC., a)
Utah corporation, GEORGE)
D'AMBROSIO, FRANK A. NELSON,)
JR., and JOHN SAVAS,)
Respondents.)

BRIEF OF APPELLANT

CASE NO. 18197

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE G. HAL TAYLOR, PRESIDING

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FILED

APR 29 1982

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BRIEF OF APPELLANT

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* * * * *

I. NATURE OF THE CASE

This is an action by plaintiffs as franchise purchasers against defendant Nu Creation Creme, Inc. as franchisor and defendants George D'Ambrosio, Frank Nelson, Jr., and John Savas, as principals and agents of said franchisor, for rescission and damages resulting from defendant's misrepresentations, breaches of contract and breaches of implied duties and obligations.

II. DISPOSITION IN LOWER COURT

The Third Judicial District Court, Honorable G. Hal Taylor presiding, granted defendants' motion to dismiss and dismissed plaintiff's Complaint.

III. NATURE OF RELIEF SOUGHT ON APPEAL

Appellant asks this Court to reverse the judgment of the District Court and remand thereto those issues raised by plaintiffs' Complaint.

IV. STATEMENT OF FACTS

Appellants, on or about March 18, 1981, duly filed a civil complaint against respondents Nu Creation Creme, Inc., George D'Ambrosio, Frank A. Nelson, Jr. and John Savas, in the United States District Court for the District of Utah, Central Division. (R. 34) Said Complaint was thereafter amended, materially altering only certain of the party plaintiffs. In addition to four pendent claims, said Amended Complaint asserted a private right of action pursuant to specific provisions of the Federal Trade Commission Act ("FTCA"), and predicated subject matter jurisdiction thereon. (R. 34) Diversity of citizenship of the parties did not exist.

More particularly, appellants alleged a breach by respondents of the affirmative franchise disclosure requirements of Title 16, Code of Federal Regulations, Section 436.1, et seq. (1980). (R. 34) Respondents moved for the dismissal of said claim together with the claims pendent thereto, alleging that a private right of action does not exist and is not maintainable under the FTCA. (R. 18) Said motion was granted by the United States District Court, Honorable Bruce S. Jenkins, and, on or about September 14,

1981, a written decision was issued dismissing Appellants' cause of action predicated on 16 C.F.R. § 436.1, together with the claims pendent thereto. (R.18)

Appellants, in response thereto, on or about September 30, 1981, duly filed a complaint against respondents in the Third Judicial District Court for Salt Lake County, State of Utah. Said Complaint realleged the claims originally appended to the FTCA claim in the United States District Court, and asserted a new cause of action grounded upon negligent misrepresentation. Appellants did not, however, assert a private right of action under the FTCA or 16 C.F.R. § 436.1, et seq. (1980). Admittedly, mention was made of the affirmative disclosure requirements of 16 C.F.R. § 436.1 et seq. (1980). Such reference was, however, made only as a suggested aid or guideline to be considered by the Court in establishing and quantifying the duties owed by respondents to appellants under a negligent misrepresentation theory.

Nu Creation Creme, D'Ambrosio and Nelson, on or about November 30, 1981, moved the Third Judicial District Court for Salt Lake County for an Order dismissing appellants' Complaint. Said motion asserted that appellants negligent misrepresentation claim was barred by the principal of res judicata, in light of the prior decision of the United States District Court. (R. 18-27, 34-65) The Third Judicial District Court, the Honorable G. Hal Taylor presiding, on or about November 30, 1981 granted respondents'

motion and, on or about December 2, 1981, entered a final order dismissing appellants' negligent misrepresentation claim with prejudice as being violative of the principals of res judicata. (R. 47-48) Appellants' appeal from said final order.

V. ARGUMENT

A. THE DOCTRINE OF RES JUDICATA IS WHOLLY INAPPLICABLE HEREIN AS THE FEDERAL COURT'S DISMISSAL CONCERNED CLAIMS SEPARATE AND DISTINCT FROM THOSE PRESENTED TO THE STATE COURT

A decision, rendered by a court having competent subject matter and personal jurisdiction over an action, is res judicata and bars a subsequent action between the same parties or their privies, on any claims previously decided as well as those which should have been adjudicated. Searle Bros. v. Searle, 588 P.2d 689 (Utah, 1978), Belliston v. Texaco, Inc., 521 P.2d 379 (Utah, 1974), Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971). This rule of law is, however, strictly limited to its terms and it is universally acknowledged that:

"A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." [emphasis added]

Restatement of Judgments, §68, comment f(2) at 302.

The United States Supreme Court, in what is considered the leading American case on the point, Cromwell v. Sac County,

94 U.S. 351, 24 L.Ed. 195 (1877), stated: . .

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Id. at 353, see also Davis v. Brown, 94 U.S. 423, 24 L.Ed. 204 (1877).

Utah, as evidenced by the Utah Supreme Court's decision in East Mill Creek Water Co. v. Salt Lake City, 159 P.2d 863 (Utah, 1945), creates no exception to this rule. The court therein stated:

". . . where, the claim, demand or cause of action is different in the two cases than the former is res judicata of the latter only to the extent that the former actually raised and decided the same points and issues which are raised in the latter."

159 P.2d at 866.

Applied to the facts presented herein, this rule of law is compelling, and, indeed conclusive. Contrary to the assertions of respondents and the apparent holding of the Third

District Court, there can be no dispute that the first cause of action asserted by Appellants' in their Amended Complaint is, in no way, related to the second cause of action filed in the state court. The factual basis and proofs for each claim are fundamentally different and they seek recovery on wholly separate and distinct acts, conduct and legal theories.

The First Cause of Action alleged in appellants' Amended Complaint to the federal court sought statutory relief for certain actions and inactions of respondents in violation of specific requirements and duties set forth in 16 C.F.R. 436.1. Said cause of action did not and does not exist at common law. It is wholly a "creature" of federal statutory law, and totally dependent upon statutorily created duties and obligations.

The factual proofs required to establish liability under said cause of action are clearly delineated in the provisions of 16 C.F.R. 436.1. They merely require the complainant to show that a franchisor has failed to disclose certain stated franchise information, or failed to proffer to such complainant certain documents regarding the purchase and terms of such franchise. The intent of the franchisor is irrelevant and no proof thereof need be presented. Similarly, the reliance of the complainant and the reasonableness thereof is not at issue and need not be proven. The question presented is simply: Did A disclose the required information to B? If the answer thereto is: No, liability is established.

The cause of action is essentially one founded upon strict liability.

The Second Cause of Action presented in appellants' Complaint filed in the state district court sought common law relief on the theory of negligent misrepresentation. Said cause of action is not, in any way, statutorily dependent and exists as a basic action for relief under Utah common law. Under this theory, respondents, by reason of their contractual, confidential and fiduciary relationship with appellants, were under an affirmative duty to act and treat appellants in good faith, with due regard to their interests, and in a reasonable business-like manner. Appellants, in said Second Cause of Action alleged that respondents did not perform in accordance with such duties, were in breach thereof, and, as a result, appellants were entitled to relief therefor.

In an effort to assist the Court in creating, establishing and quantifying the duty owed to appellants under its negligent misrepresentation theory, appellants referenced the provisions of 16 C.F.R. §436.1. Such statute did not in any way constitute the basis of said cause of action and the reference thereto was not intended and did not alter the theory upon which said cause of action was grounded nor the factual proofs required.

Contrary to the virtual strict liability standard and proofs presented in appellants' First Cause of Action in the federal court, the factual showings necessary for claims predicated on

negligent misrepresentation are extensive. Each and every element of such misrepresentation, a statement or omission, intent, reliance, materiality and damage, must be specifically and conclusively proven. None of said issues are presented nor need be proven with respect to actions under 16 C.F.R. 436.1. Similarly, none of such issues have any relevance nor probative value to the outcome of such an action.

Clearly, there exists no reasonable relationship between two actions at issue herein and neither can or should have any res judicata effect upon the other. For that reason, the decision of the lower court dismissing appellants' complaint must be reversed.

B. DISMISSAL BY THE UNITED STATES DISTRICT COURT WAS NOT "ON THE MERITS" AS TO THE ISSUES PRESENTED TO THE STATE COURT AND DO NOT BAR THE SUBSEQUENT ASSERTION THEREOF.

As noted above, while a final decision will, given proper parties and claims, reconstitute a legal bar to the reassertion of said claims at a later date, such a decision will not be conclusive in an action on different claims as to facts not previously litigated. Cromwell v. Sac County, 94 U.S. 351, 24 L.Ed. 195 (1877), East Mill Creek Water Co. v. Salt Lake City, 159 P.2d 863 (Utah, 1945). Stated differently, the dismissal of a cause of action, not on the merits, does not, as a matter of law, constitute a bar to the subsequent assertion thereof in a court of competent jurisdiction. Rhoades v. Wright, 552 P.2d 131 (Utah, 1976), Gibson v. Utah State Teachers Retirement Board, 105 P.2d 353 (Utah, 1940).

The case at bar presents precisely this issue. It is asserted by respondents that the prior decision of the United States District Court is res judicata as to the merits of appellants' claim as set forth in the Complaint filed therein. Such assertions are, for the reasons set forth in Cromwell and East Mill Creek, patently in error.

It is undisputed that the decision of the United States District Court solely related to and concluded that, as a matter of law, there exists no private right of action under the FTCA, and more specifically 16 C.F.R. § 436.1 thereof. As such, said decision can only have res judicata effect in those situations wherein appellants subsequently seek private relief for alleged violations of the FTCA and 16 C.F.R. § 436.1. Such decision did not, as respondents assert, hold that the basic actions asserted by appellants were without merit. Consequently, said decision cannot and does not have any effect, res judicata or otherwise, as to the substantive merits of claims predicated thereon.

For these reasons and in light of the fact that appellants' claim for relief asserted in the state court bears no reasonable relationship to that dismissed in the federal court, said federal dismissal cannot and does not hinder or in any way effect the ability of appellants to bring said state misrepresentation claim. The dismissal thereof on the basis of res judicata was and is patently wrong.

VI. CONCLUSION

The District Court's ruling is contrary to Utah law as it has been declared by this Court. The District Court has, without legally valid grounds, undertaken to dismiss a legally cognizable existing and assertable cause of action and the District Court's order and judgment pursuant thereto should be reversed.

Respectfully submitted this 29th day of April, 1982.



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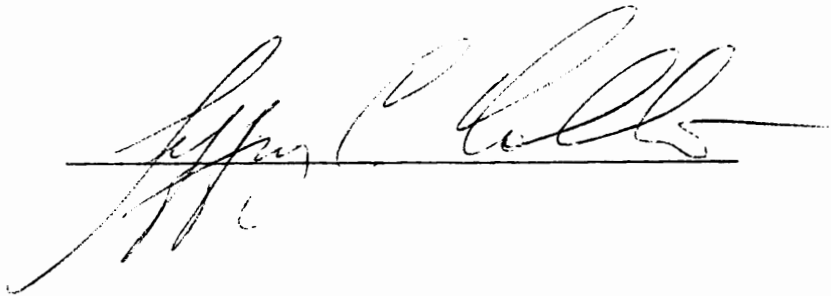
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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Appeal Brief in Case No. 18197, postage prepaid, this 29 day of April, 1982, to Paul N. Cotro-Manes, Cotro-Manes, Warr, Green & Shand, Attorneys for Respondent, at Suite 280, 311 South State Street, Salt Lake City, Utah 84111.

A handwritten signature in dark ink, appearing to read "Jeffrey P. Collier", is written over a horizontal line.